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OCT 27 1981
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION and JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

versus

THE STATE OF MISSISSIPPI, ET AL.,
Appellees,

On Appeal from the United States District Court for the Southern District of Mississippi

BRIEF OF AMICUS CURIAE, LOUISIANA PUBLIC SERVICE COMMISSION

HAUSER PRINTING COMPANY, INC., 613 DISTRIBUTORS ROW, HARAHAN, LA. 70123

QUESTIONS PRESENTED

Amicus, Louisiana Public Service Commission, suggests that this litigation involves at least a determination of the following questions:

1) Do the challenged portions of PURPA constitute to the majority of the Court an unreasonable legislative pronouncement by Congress regarding what is to be considered "interstate commerce"? If so, the matter could be at an end; if not, then:

2) Is the majority of the Court satisfied that the Constitution of the United States, by enunciating the principle that the federal government may regulate commerce among the states, thereby delegates to the Congress the right to make the general police power of the states subordinate to the commerce power in such a manner that Congress can actually dictate to a state agency what it must consider substantively and what procedures it must follow (Titles I and III of PURPA) even though that state agency is proceeding under a traditional state police power and even though Congress has formulated no national policy regarding its mandated procedures and consideration of standards? And with respect to Section 210, even if it **has** established a policy?

3) With respect to Section 210 of Title II of PURPA, as well as Titles I and III, has Congress exceeded its authority under the Commerce Clause by exceeding the limitation enunciated in the Tenth Amendment of the United States Constitution so that the challenged sections of PURPA fall within the ambit of *National League of Cities v. Usery,* 426 U.S. 833 (1976)?

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I.
INTEREST OF AMICUS

A. Titles I and III of PURPA.

In Titles I and III of the Public Utility Regulatory Policies Act of 1978 (PURPA), the Congress of the United States has mandated that the several states consider (but not necessarily adopt) certain standards regarding the intrastate regulation of electric utilities; and, in doing so, Congress has also mandated that the states follow certain procedures in such consideration. The essential details of these congressional commandments to the states are set forth on pages 3-8 of Appellants' Brief.

From the standpoint of an elected state agency, Titles I and III give rise to two troublesome questions:

1) A controversy arises because Titles I and III assert no national policy; they therefore appear to be an attempt to exercise a power to command a state as a state to do something without any standard or objective by which to judge the reasonableness of the exercise of that purported power; and

2) A controversy arises because if the state agencies are compelled to follow the congressional mandate, whether such mandate is accompanied by standards or not, then they are left without the autonomy to decide for themselves what things to consider and what procedures to use in an area long regarded as being within the general police power of the state, that is, long regarded as being intricately tied to the general health, welfare and general well-being of the state's citizens.

B. Section 210 of Title II of PURPA.

In Section 210 of Title II of PURPA, Congress has adopted certain policies regarding small power generators and provided for the enforcement of those policies

against the states, although admittedly providing for some state input. See pages 8-12 of Appellants' Brief.

Thus, while in Title II the Congress has formulated a policy which may be viewed as to its reasonableness, the question still remains as to whether Congress can, in essence, compel a state body as a state to act as a congressional agent in areas historically regarded as within the general police power of the state autonomously and as sovereign.

The Louisiana Public Service Commission (Commission) sides with the Appellees insofar as we urge that Titles I and III are not only too broad (standardless) to be regarded as a reasonable regulation of commerce, but we additionally argue that all challenged sections exceed the prohibition announced by *Usery* in that the states' traditional police powers, and their autonomy, are negated by PURPA.

By constitutional mandate[1] as well as enactment of statutes found in Title 45 of the Louisiana Revised Statutes of 1950, the Louisiana Commission has for almost 60 years been charged by the citizens of the State with the regulation, under its police power, of the rates and service practices exacted and rendered respectively by electric public utilities for business done on an intrastate basis within Louisiana, while, as a general rule, interstate sales and transmission of electricity and sales of electricity at wholesale have been regulated by the Federal Energy Regulatory Commission (FERC) and its predecessor, the Federal Power Commission, since the Federal Power Act of 1920.[2]

1— See Appendix C of Louisiana Public Service Commission's Brief in Support of Appellees' Motion to Affirm, which sets forth the relevant portions of the State Constitutions.

2— Ch. 285, 41 Stat. 1063 (1920) 16 U.S.C. 791 *et seq.*

The Louisiana Commission aligns itself generally with the State of Mississippi and the Mississippi Public Service Commission contesting the constitutionality of PURPA, The Commission does not challenge the standards of PURPA *per se.* However, this Commission questions the authority of Congress (Titles I and III) to command a state agency having state constitutional status to consider whether to adopt certain standards and follow procedures which not only directly, but sometimes exclusively, affect local sales and service practices of electric public utilities, and in doing so simultaneously displace a state commission's freedom to structure internal operations *by imposing on it affirmative burdens to make certain choices and to report back to Congress' agent in writing.* See 16 U.S.C. Section 2626. Comprehensively viewed, PURPA represents a complete departure from the historical recognition by Congress of autonomous and integral state governmental police functions, and in the Louisiana Commission's judgment, must be viewed as the unfortunate usurpation of an elected state official's power and function. We know of no congressional directive which so overtly mandates state officials to act, without any option, on behalf of the federal government, both substantively and procedurally, and absent policy, particularly in areas long since the subject of state regulation under the general police power. And, if this legislation is finally accorded constitutional status, we are unaware of any real or imagined practical restraint on the power of Congress to order virtually anything to be done by a state and its elected officials and employees, which Congress deems appropriate for the times.

II.
SUMMARY OF ARGUMENT

We are firm in the belief that the regulation of public utilities is a function of the state's general police power. *Munn v. Illinois,* 94 U.S. 113 (1877). See also 73 C.J.S., Public Utilities § 11, p. 1006. Police power, in a modern sense, is the authority retained by the several states and confirmed in existence through the Tenth Amendment of the United States Constitution which enables local governments to enact and promulgate such laws and regulations as tend to secure generally the comfort, safety, morals, health and prosperity of its citizens. As *Munn* discloses, this power has its roots deep in common law as an element of sovereignty.[3] The rationale of *Munn* is that because of the very nature of the enterprise, the property of the utility is "affected with a public interest" and subject to state regulation.

Today, however, the criteria of the validity of price control and regulation by the state is less restrictive by reason of the Supreme Court's decision in *Nebbia v. New York,* 291 U.S. 502 (1934). *Nebbia* upheld a state statute creating a Milk Control Board for the regulation of the dairy industry. In clarifying the earlier language in *Munn,* the majority opined that: ". . . *'affected with a public interest' is the equivalent of 'subject to the exercise of the police power';* and it is plain that

3 — Quoting from Lord Chief Justice Hale's Treatise *De Portibus Maris* (1670), Chief Justice Waite stated for the majority: "When . . . one devotes his property to a use in which the public has an interest, he, in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good. . ." *Munn,* 94 U.S. at 126. See also, Clay, C.M., *Regulation of Public Utilities,* Henry Holt and Co. (1932 ed.) at p. 8-11. While characterizing the police power of the states as "the dark continent", Clay perceived the due process provision of the Fourteenth Amendment to be the vehicle by which the state's police power is principally restrained on a national level.

nothing more was intended by the expression." *Id.* at 533. (Emphasis added.) The majority recognized that "(t)he phrase 'affected with a public interest' can. . . mean no more than that an industry, for adequate reason, is subject to control for the public good." *Id.* at 536. The category of activities subject to state regulation has been substantially broadened by *Nebbia;* therefore, *a fortiori,* public utilities are unquestionably "affected with a public interest" and within the sphere of a state's police power.

No specific and enumerated constitutional grant of power to the federal government can be read in a manner such that Congress can, by the exercise of that specific grant of authority, abrogate *by outright mandamus* the free and uninhibited exercise by the states of other powers long recognized to be general in nature and intrinsic to the notion of autonomy and sovereignty.

Certainly the police power to regulate public utilities because of the nature of their important and privileged status is not an exercise *per se* of a state's attempt to regulate even intrastate commerce as such. And if the police power deriving from the status of public utility was not delegated, it must have been reversed.

III.
ARGUMENT

A. *The statute in question is not a regulation of commerce as commerce has been defined.*

This case presents important constitutional questions concerning the proper role of the federal government and the states in the federal system. Simply framed, the issue before this Court is whether Article I,

Section 8, Clause 3 ("Commerce Clause") of the United States Constitution cloaks the Congress with the constitutional authority to command the states to perform affirmative duties and otherwise implement federal policies perhaps against their wishes, in an area traditionally regulated by the states under the general police power. Unlike many congressional approaches to interstate matters, including that in *Hodel v. Virginia Surface Mining & Reclamation Association,* ___ U.S. ___,101 S. Ct. 2352 (1981), relied upon by Appellants, *the state agencies affected by PURPA have no option except to comply with Congress' wishes.* This power-based confrontation places the specific and expressed authority of Congress to regulate commerce "among the several States" directly in opposition to the non-enumerated or non-delegated reservation of power reflected in the Tenth Amendment.

Appellants argue that Congress enlisted the assistance of the states to effectuate the provisions of PURPA and was careful to preserve their freedom. In reality, Congress has conscripted the state regulatory agencies by requiring that each state "shall... implement" the rules prescribed by FERC[4] under threat of injunctions,[5], mandamus[6], forfeitures[7] and penalties[8] against the state regulatory authorities. These sanctions clearly are not indicative of voluntary enlistment programs, nor are the sanctions avoidable.

The Appellants' assertion that the plenary power of the Commerce Clause enables Congress to force the states to exercise state governmental powers on Congress' behalf represents a departure from over two

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4 — 16 U.S.C. Sec. 824a-3f; Sec. 210 (f)
5 — 16 U.S.C. Sec. 825m(a)
6 — *Ibid.* Sec. 825m(b)
7 — *Ibid.* Sec. 825n
8 — *Ibid.* Sec. 825o

hundred years of cooperation between the federal government and the states. In the past, the federal government has had ample power to achieve its purposes by acting directly on private individuals, by conditioning availability of federal funds to the states upon their compliance with federal programs, by giving the states the option to participate in an otherwise totally federal program, or by pre-empting state activities that interfere with expressed federal goals by creating a federal program that exists independently of the states. In the instant case, it is a state police activity that is affected, withholding of federal funds is not involved, and there is no known conflict between state and federal policies.

The power of Congress to draft the states to effectuate inconsistent or non-stated federal policy rests upon a novel constitutional theory which violates two fundamental structural principles of our federal system. First, the Constitution limits the powers of the federal government to specific enumerated subjects, such as interstate commerce. We suggest that the exercise of a state's historical and general police power over utilities is not "commerce" in the constitutional sense, and, further, that in a constitutional sense, the power to regulate commerce is not the power to regulate state agencies engaged in legitimate and general police functions[9].

Secondly, this Court has repeatedly recognized that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter,

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9 — For example: requiring reasonable interest payments on consumer deposits; regulating the billing practices (such as penalties for late payment) of utilities; regulating the effects of erroneous billings; adjusting financial statements to reflect properly the effects of subsidiary operations; adopting tariff policies which account for local social aims; preventing a utility from penalizing an innocent subscriber because of his relationship with a guilty subscriber, and the like.

but because the Constitution prohibits it from exercising the authority *in that manner.*" (Emphasis added.) *National League of Cities v. Usery,* 426 U.S. 833, 845 (1976). PURPA displaces the functions that we think are clearly "essential to separate and independent existence," *Id.,* namely, the free and independent exercise of the general police power.

We perceive the power granted to Congress under Article I, Section 8, Clause 3 of the Constitution as the power to regulate commerce, and not the power to regulate the policing activities of a state in providing for the general welfare of its citizens. In the past, this Court has given broad recognition to the extensive power of Congress to regulate both private and state governmental activities that affect interstate commerce. However, the decisions of this Court have always recognized a limitation on that power imposed by the very words of the Commerce Clause itself. Mr. Chief Justice Hughes in *Santa Cruz Fruit Packing Co. v. NLRB,* 303 U.S. 453 (1938), defined that limitation as follows:

> "The subject of the federal power is still 'commerce', and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains."
>
> *Id.* at 466

Mr. Justice Brennan, in his dissenting opinion in *Usery,* acknowledged ". . . the Court's function of limiting congressional exercise of its power to regulation of 'commerce'," and that ". . . regulations that this Court can say are not regulations of 'commerce' cannot stand." *Usery,* 426 U.S. 833 at 860, quoting *Santa Cruz,* 303 U.S. 453 at 466.

We agree with Appellants that on several occasions this Court has upheld the power of Congress under the Commerce Clause, or otherwise, to influence certain state activities.[10] The common denominator of all of those cases appears to be an implied holding that the state activities subject to congressional authority were not uniquely governmental in nature, and were not activities intrinsic to the existence of the state's police power.

Maryland v. Wirtz, 392 U.S. 183 (1968), marks, to date, the highwater mark of this Court's recognition of congressional power to regulate state activities under the Commerce Clause. Although this Court overruled the far-reaching implications of *Wirtz* in *National League of Cities v. Usery*, 426 U.S. 833 (1976), it is important to note that even the expansive view of congressional power over state activities expressed in *Wirtz* clearly did not espouse as a general notion that the exercise of a state's general police power is commerce or an activity affecting commerce. If so, there would be no police power left in the states, for there are few exercises of governmental power which have no commercial effect. The majority opinion in *Wirtz* was careful to enunciate the limits imposed by the words of the Commerce Clause itself. Mr. Justice Harlan, in rejecting the

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10 — *Board of Trustees of the University of Illinois v. United States*, 289 U.S. 48 (1933) (a state university can be required to pay the federal duty on imported scientific equipment); *United States v. California*, 297 U.S. 175 (1936) and *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964) (upholding, respectively, the application of the Federal Safety Appliance Act and the Federal Employers Liability Act to state-owned railroads); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding the 1961 amendments to the Fair Labor Standards Act extending the minimum wage and maximum hour provisions of that Act to employees of state operated institutions and schools); *Fry v. United States*, 421 U.S. 542 (1975) (holding that state employees were subject to wage and salary controls imposed by the Economic Stabilization Act of 1970).

dissenting opinion's suggestion in *Wirtz* that all state activities affect commerce and were subject to federal regulation under the commerce power, stated that:

> "... while the commerce power has limits, valid ... regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.
>
> XXXX
>
> [This Court] will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens."
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> 392 U.S. at 196-199.

The significance of this language is that the activities of a state subject to federal control (because of their effect on commerce) are limited to activities which can be engaged in by both state-owned enterprises and privately owned enterprises or private individuals. Therefore, if private enterprises cannot engage in a particular kind of activity, or conversely, if a particular activity is uniquely governmental, we think that to date it has not been recognized as commerce in the constitutional sense.

The regulation of public utilities is an activity uniquely governmental and cannot be engaged in by private enterprises or individuals. The same distinction can be made with regard to the activities declared

in *Usery* to be typical traditional state functions, to wit, fire prevention, police protection, public health and the like. If we are correct in urging that the constitutional definition of commerce, or activities affecting commerce, still depends upon the existence of such a distinction, then the state regulatory activities sought to be controlled by the federal government through the questioned provisions of PURPA are clearly *not* activities constituting commerce or affecting commerce. Accepting this premise, PURPA is unconstitutional because the subject matter of the legislation falls outside the sphere of congressional power under the Commerce Clause.

B. *PURPA destroys the federal system.*

Since Chief Justice Marshall's seminal decision in *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1 (1824), this Court has never approved the notion that the federal government, under its commerce power, has the authority to compel the states as states to act as an agent in enforcing federally mandated regulatory programs. In *Gibbons,* the Court held that the power of Congress under the Commerce Clause to license vessels engaged in interstate commerce limited the power of New York to the regulation of those same vessels sailing in New York waters. Chief Justice Marshall was careful to observe, however, that the commerce power of Congress does not include the authority to compel the states to exercise their police powers simply in aid of Congress. The Chief Justice stated:

> "If congress license vessels to sail from one port to another in the same State, the act is supposed to be, necessarily, incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, *or to act*

> *directly on its system of police* . . . All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical.
>
> XXXX
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> This, however, *does not prove that the one is exercising, or has a right to exercise, the powers of the other."*
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> *Id.* at 204-05. (Emphasis added.)

Chief Justice Marshall recognized that the power of the federal government and the power of the states may appear to be similar, and may thereby be confounded or confused, but, because they derive from distinct sources, the powers are not such as to authorize one entity to exercise self-appointed agency in usurping the power of the other, and it is certainly implied that one could not command the other to act as agent. The federal power extends to subjects such as interstate commerce. It does not extend to operate such that the general police power of the states over its citizens is negated by a congressional mandamus. Adequate preemptive measures are otherwise available to the federal government at far less expense to Federalism.

Recently, this Court, for the first time in four decades, struck down a federal program regulating state governmental activity on the grounds that it unconstitutionally interfered with the autonomy of the states. In *National League of Cities v. Usery,* 426 U.S. 833 (1976), this Court held, but with a vigorous dissent, that the state's power to determine the wages and hours of its employees was a "function[] essential to separate and independent existence," 426 U.S. at 845, and it

declared invalid the minimum wages and maximum hours provisions of the Fair Labor Standards Act as applied to the states because those provisions "directly displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852. The provisions of PURPA at issue in this case represent a much more serious interference with integral governmental functions than did the federal legislation before the Court in *Usery*. By commanding the states to consider certain substantive notions, adopt certain regulations, follow certain procedural steps, and report back in writing, PURPA not only displaces important state policy decisions, but it also interferes with the essential processes of a state government in discharging its function of administering the state public law through an elected state regulatory commission.

The citizens of the State of Louisiana have regarded the regulation of public utilities as comprising an integral function of state government such as to justify the constitutional creation of an elected state agency to regulate such entities as early as 1898. The creation of state regulatory commissions necessarily falls within the general police power of the State, and we know of no authority, other than Titles I and III of PURPA, for the proposition that historical state police functions may be dictated to a state agency in such a sweeping manner by the United States Congress, either in substance or procedure, perhaps under the rubric of "concurrent jurisdiction," although the only result of concurrency in this matter is the predictable and overwhelming effect of the Congressional mandate. In effect, the state becomes an agent of the federal government, although the state's power to regulate public utilities is an exercise of the general police

power, and the state employees and public officials are neither hired by nor compensated by the federal government.

We perceive that the plurality opinion of *Usery* acknowledged that a limited intrusion into areas of integral state government functions is constitutionally permissible in some instances. This exception comes about because of the plurality's reluctance to discard the viability of *Fry v. United States,* 421 U.S. 542 (1975), which was distinguished from *Usery* on four grounds. 426 U.S. at 852, 853. We agree with Appellees that the *Fry* distinctions are clearly absent in this case.[11] Therefore, in the plurality's view, any Commerce Clause legislation which "would impair the States' 'ability to function effectively in a federal system' " or would "displace the States' freedom to structure integral operations in areas of traditional governmental functions" is unconstitutional, absent the *Fry* distinctions. 426 U.S. at 852.

The concurring opinion of Justice Blackmun, *Id.* at 856, advocates the use of a balancing-of-interests test, or a weighing of the national interests of regulating a certain activity against the interests of the states to continue such regulation. The conservation of energy and the reduction of this nation's dependency on foreign oil are indeed valid interests of the federal government; however, such interests are not "demonstrably greater", *Id.*, than the states' general policing role in the federal system.[12] Practically speaking, it is difficult to believe that Congress, with its heterogeneous composition, can more adequately make policies affecting in-

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11 — Appellees' Motion to Affirm, page 20.

12 — We do not argue here that the federal government is powerless to accomplish its objective. Our objection is as to the manner in which PURPA seeks to do so.

trastate utilities, than can specialized state agencies, which inherently are more familiar with local conditions, availability of resources and the constituents who will be affected as consumers. Indeed, the Louisiana Commission is regarded as expert in its own right. *Baton Rouge Water Works v. Louisiana Public Service Commission,* 342 So.2d 609 (1977). See generally, 2 Davis, *Administrative Law Treatise,* Section 14.13 (1958).

CONCLUSION

A laudable general purpose or motive alone should not serve purely of itself to save otherwise unconstitutional legislation, and a sensible rationale that rests on general social and economic considerations, no matter how seemingly appropriate, should not be the crowbar by which the dual form of government, guaranteed by the Constitution, is pried and discarded from a system that has proved itself worthy for over 196 years. We wish to make clear that we do not believe PURPA to have been conceived by men of ill wishes, nor for an ill purpose. Indeed, for the most part, we have little quarrel with the consideration of matters raised by PURPA. With due deference, however, we believe that Titles I and III, and Section 210 of PURPA, represent an error of law and judgment which threatens to invite congressional directives to be issued to many, if not ultimately all, state elected officials and employees — directives to consider, publish, notice, hear, allow and otherwise respond in writing by reason of the federal Congress' notion of what might be best for the state governments to do at the moment.

The utilities industry, as most other quasi-monopolistic industries, must be regulated to insure adequate service at reasonable rates, and the Louisiana Commission would receive suggestions from federal agencies of feasible means to achieve more efficient methods of production, transmission and distribution of energy. However, conscripting the states or their agencies to effectuate a sometimes vague and inconsistent federal statute is repugnant to state sovereignty.

For the above reasons, we urge this Court to find,

as the District Court assessed, that Title I, Section 210 of Title II, and Title III of PURPA are unconstitutional.

Respectfully submitted,

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Certificate

I certify that I have this day mailed by U.S. Mail, postage prepaid, a copy of the foregoing Brief to counsel of record, as shown in the service list annexed hereto as Exhibit A.

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